STATE OF MICHIGAN

COURT OF APPEALS

FIRE INSURANCE EXCHANGE, Plaintiff-Appellant,	UNPUBLISHED June 23, 2011
v	No. 297544 Wayne Circuit Court
EARL MILLER, Defendant-Appellee.	LC No. 2008-019554-CK

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's denial of its two motions for summary disposition. We affirm.

In 2008, defendant was a 50% co-owner/investor of Real Place, Inc. ("Real Place"), a group home for the mentally disabled. Renee Alford held the remaining 50% interest in Real Place. Defendant also owned the property where the group home was located and leased the premises to Real Place for its operation of the group home. The property was insured through a landlord protector's insurance policy issued to defendant by plaintiff.

In March 2008, one of the residents of the group home, Erynn, drowned in a bathtub after being left unattended. Erynn's estate initiated a lawsuit against defendant, Real Place, Renee Alford, and another company, asserting that they were liable for Erynn's death. In April 2008, defendant requested indemnification from plaintiff for any damages recovered against him in the underlying wrongful death lawsuit. Plaintiff thereafter filed this declaratory action, seeking a declaration that it was not obligated to provide indemnity to defendant based upon the unambiguous terms of the insurance policy it issued to defendant. In July 2009, a settlement was reached in the underlying lawsuit.

In August 2009, plaintiff moved for summary disposition in its favor pursuant to MCR 2.116(C)(8) and (10), contending that because defendant operated Real Place, Inc. on the property as a business pursuit, liability coverage was excluded under both a "business pursuits" exclusion and a "professional services" exclusion in the policy. Defendant moved for summary disposition in his favor pursuant to MCR 2.116(I)(2). The trial court denied plaintiff's motion and granted summary disposition in defendant's favor. In doing so, the trial court determined that defendant was sued in his capacity as a landlord and that the proximate cause of Erynn's

death was an accumulation of water in the bathtub due to a faulty drain—a landlord liability issue. As a result, the exclusions were inapplicable.

Plaintiff thereafter filed a second motion for summary disposition, alleging that it was not obligated to indemnify defendant for any damages recovered against him as a landlord in the underlying lawsuit because defendant failed to fully comply with the terms of the insurance policy and because he waived his right to coverage under the policy by entering into a settlement agreement. The trial court again denied plaintiff's motion based upon the fact that it had already decided the matter of liability, and ultimately ordered plaintiff to indemnify defendant in the amount of $100,000.00, its policy limit. Plaintiff now appeals the denial of both its motions for summary disposition.

Actions in the nature of declaratory judgments are reviewed de novo by this Court. *Automobile Club Ins Ass'n v Page*, 162 Mich App 664, 666-667; 413 NW2d 472 (1987). This Court also reviews de novo a trial court's grant or denial of a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Motions for summary disposition brought under MCR 2.116(C)(8) test the legal sufficiency of the complaint solely on the basis of the pleadings. *Dalley v Dykema Gossett*, 287 Mich App 296, 304-305; 788 NW2d 679 (2010). Summary disposition should be granted under subrule (C)(8) only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Id.* at 305.

A motion for summary disposition under MCR 2.116(C)(10) is properly granted if, after viewing the submitted evidence in a light most favorable to the non-moving party, no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition may be granted to an opposing party pursuant to MCR 2.116(I)(2) if the trial "court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Washburn v Michailoff*, 240 Mich App 669, 672; 613 NW2d 405 (2000).

This Court also reviews de novo the proper interpretation of an insurance contract, see *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Unambiguous contracts must be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Absent ambiguity, contractual interpretation begins and ends with the actual words of a written agreement. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

On appeal, plaintiff first asserts that its first motion for summary disposition should have been granted because defendant was not sued in his capacity as landlord, and because two exclusions in the insurance policy it issued to plaintiff precluded coverage. Neither party asserts that the insurance contract is ambiguous. Instead, the disagreement turns upon whether the exclusions are applicable to the specific facts of the underlying lawsuit. To determine the applicability of the insurance contract and its exclusions, we must first determine the capacity in which defendant was sued in the underlying lawsuit. While the trial court found that defendant was sued in his capacity as a landlord leasing the premises to Real Place, plaintiff contends that such finding was erroneous.

In the first amended complaint, Erynn's estate sued Real Place, Renee Alford, Earl Miller and Synergy Partners, LLC. The complaint identifies Real Place as a Michigan corporation, but does not reference defendant in a personal capacity. The only references to defendant in the complaint, in fact, appear in paragraph 6, wherein it is stated that "at all times relevant to this cause of action, Real Place was owned, operated, managed, supervised and conducted as a place of business by Renee Alford and/or Earl Miller" and in paragraph 29 wherein it is stated that "Real Place, Inc. through its owners, Renee Alford and/or Earl Miller made a conscious decision to cover up the facts and circumstances of Erynn []'s death . . ." These allegations clearly relate to defendant's liability in his capacity as an owner of Real Place. However, the duty to indemnify is not determined solely on the basis of the terminology used in a plaintiff's pleadings. *U.S. Fidelity & Guar Co v Citizens Ins Co of America*, 201 Mich App 491, 493-494; 506 NW2d 527 (1993). Instead, a court must focus on the *cause* of the injury to ascertain whether coverage exists. *Id*.

In its complaint in the underlying action, plaintiff alleged that Erynn was to have 24 hour supervision and, because of her condition, was not to be placed in a situation where she could drown. Plaintiff alleged that Real Place, through its employees, agents, and assigns was aware for several months of the fact that the drain in the tub where Erynn died was not functioning properly, that the defective drain was allowed to continue to exist, that Erynn was left alone while showering in the tub with the defective drain, and that she ultimately drowned in an accumulation of water in the tub. Thus, while the stated theories of liability focused on the actions, or inactions of Real Place, the pleadings clearly indicate the potential liability of the landlord or owner of the premises where the defective drain was known to exist and allowed to continue without remedy for a period of time.

That Miller was facing potential liability in his role as a landlord was acknowledged by plaintiff in its responsive letter to Miller upon receipt of his notice of the underlying lawsuit against him. Plaintiff stated:

> Thank you for submitting the above claim to us for consideration. We have had the opportunity to review the allegations in the lawsuit you have tendered to us. The lawsuit alleges you are negligent as the landlord because of an improperly working drain and your failure to fix this drain after you allegedly knew it was not working correctly.

From the outset, then, plaintiff understood Miller to having been sued in his capacity as a landlord.

The trial judge ruling upon plaintiff's motion for summary disposition in the instant matter was also the trial judge in the underlying lawsuit. In ruling on plaintiff's motion, the trial judge stated, ". . . I had that underlying case. I know what that case was about. It was always that he was the landlord and failed to keep that property [sic], and he has an obligation to keep it safe." Thus, we are satisfied that defendant was sued, at least in part, in his role as a landlord. Whether plaintiff could have actually recovered against Miller in his capacity as landlord is irrelevant for our purposes.

Plaintiff next asserts that summary disposition should have been granted in its favor because a "business pursuit" exception in the policy precluded coverage. We disagree.

The "business pursuit" exception provides as follows:

> We do not cover bodily injury, personal injury or property damage which:
>
> 1. arises from or during the course of business pursuits of an insured other than the rental of the insured location.

"Business" is defined in the policy as "the rental or holding for rental of any one or two family dwelling by the insured. It also means any full or part-time trade, profession, or occupation." Under the exception, then, plaintiff does not cover injuries or damages that arise during an insured's business pursuits.

It is undisputed that defendant was the only named insured on the policy. Thus, for the exclusion to apply, the injury must have occurred during defendant's business pursuit. According to plaintiff, the death leading to the underlying lawsuit arose during the defendant's business pursuit of operating a continuous, for-profit group home on the property such that the business pursuit exception to coverage applies. However, defendant is a co-owner of a corporation, Real Place, which operates a business on the premises owned by defendant. Defendant did not personally operate the group home on the premises. Instead, a separate business entity of which he was a co-owner operated a group home on the premises.

"The law treats a corporation as an entirely separate entity from its shareholders, even where one individual owns all the corporation's stock." *Rymal v Baergen*, 262 Mich App 274, 293; 686 NW2d 241 (2004). Where Real Place is a separate corporate entity and plaintiff has not alleged that Real Place was a mere instrumentality of defendant or that defendant used Real place to commit a wrong or fraud, we will honor the distinction between a corporation and its shareholder, defendant. The business actions of Real Place cannot be attributed to defendant such that the "business pursuits" exception in the insurance policy is inapplicable.

Plaintiff further asserts that a "professional liability" exclusion in the policy also precludes coverage in this matter. The exclusion relied upon by plaintiff states that plaintiff will not cover bodily injury, personal injury or property damage which "results from the rendering or failure to render professional services." Plaintiff asserts that Erynn's death was the result of Real Place employees failing to supervise Erynn as required, i.e., the failure to render the professional service for which they were hired. We disagree.

It is true that Erynn required supervision at all times. It is also true that Erynn was not provided with such supervision while in the shower. However, the medical examiner's report indicated that Erynn was found with her face submerged in water and that water was found in her lungs and stomach. The cause of Erynn's death was listed as drowning. Thus, while the lack of supervision certainly played a *role* in Erynn's death, had there not been an accumulation of water in the bottom of the bathtub due to an allegedly faulty drain, Erynn likely would not have drowned. It cannot be conclusively stated, then, that the injuries *resulted from* the failure to render professional services. The professional liability exclusion is therefore inapplicable.

Plaintiff next asserts that its second motion for summary disposition should have been granted because Miller failed to comply with the terms of the policy and waived his right to coverage under the policy when he agreed to enter into a final judgment. However, plaintiff did not raise these issues in its first motion for summary disposition before the trial court. In denying plaintiff's first motion for summary disposition, the trial court also granted Miller's request for judgment in his favor, declaring that plaintiff had a duty to indemnify Miller with respect to the underlying action. Liability at that point had been conclusively established and though plaintiff moved for reconsideration, it did not do so on the grounds asserted in its second motion for summary disposition. It could be argued, then, that plaintiff was estopped from arguing in a second motion those issues which it could have argued, but did not, in its first motion.

Even if plaintiff were not estopped from now raising these issues, they are without merit. Plaintiff asserts that Miller failed to comply with the following policy provision:

> *Suit Against Us.* We may not be sued unless there has been full compliance with the terms of this policy. No one has any right to make us a party to a suit to determine the liability of a **person** we insure. We may not be sued under Coverage E – Business Liability until the obligation of the **insured** has been determined by final judgment or agreement signed by us.

While plaintiff directs us to ways in which Miller allegedly failed to fully comply with the terms of the policy, it completely ignores the very first part of the sentence upon which it relies--- "We may not be sued unless . . ." Miller did not sue plaintiff. Plaintiff sued Miller. So, while it is true that Miller could not sue plaintiff unless he complied with the terms of the policy (and until Miller's obligation has been determined), where Miller did not sue plaintiff and plaintiff instead chose to initiate suit against Miller for a declaration of its liability, the provision above relied upon by plaintiff is irrelevant.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto